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NOTES AND COMMENTS

Bills and Notes—Release Clauses in Stop Payment Orders

A depositor wanted to stop payment on a check drawn by him and not yet presented to the drawee bank for payment. He signed a "Request to Stop Payment" on a printed form given him by the bank's clerk. The "request" contained the following release under seal: "Should the check be paid through inadvertence, accident, or oversight, it is expressly agreed that the bank will in no way be held responsible. The bank receives this request upon the express condition that it shall not be in any way liable for its act should the check be paid by it in the course of its business. The undersigned agrees to be legally bound hereby." Three days later the check was paid by the drawee bank "through inadvertence, accident, or oversight" and charged against the drawer's account. The Pennsylvania Supreme Court, reversing a Superior Court decision,¹ held the release clause void as against public policy.²

The effectiveness or validity of release clauses has been decided so far in eight states and in one federal district court.³ Until the recent Pennsylvania decision, the majority of jurisdictions had held such clauses to be enforceable.⁴ It is, of course, well established that "at common law a bank is liable to the drawer of a check for payment after receipt of a proper non-payment notice."⁵ The two points on which the courts are obliged to examine such clauses have been (1) the consideration question and (2) the public policy question.

As to the first, some courts have held that the consideration to the bank for the express agreement not to pay the check grows out of the "mercantile relation of the parties and the reciprocal rights and obligations which the law attaches to that relation."⁶ The common law liability

¹ *Thomas v. First National Bank of Scranton*, 173 Pa. Super. 205, 96 A. 2d 196 (1953).

² *Thomas v. First National Bank of Scranton*, 376 Pa. 181, 101 A. 2d 910 (1954).

³ California, Connecticut, Indiana, Massachusetts, New Jersey, New York, Ohio, Pennsylvania, Federal District Court of Puerto Rico.

⁴ New York, Massachusetts, Indiana, Federal District Court of Puerto Rico, and Pennsylvania had held such release clauses enforceable. The principal case reversed a decision in 173 Pa. Super. 205, 96 A. 2d 196 (1953). This case had itself overruled two decisions of the Pennsylvania District and County Court, *Michaels v. First National Bank of Scranton*, 73 Pa. D. & C. 557 (1951); and *Adams v. Homewood Bank at Pittsburgh*, 76 Pa. D. & C. 557 (1951). The principal case also distinguished an early Pennsylvania case, *Cohen v. State Bank of Philadelphia*, 69 Pa. Super. 40 (1917), holding such agreements enforceable.

⁵ *Stearne, J. in Thomas v. First National Bank of Scranton*, 376 Pa. 181, 184, 101 A. 2d 910, 911 (1954).

⁶ *Tremont Trust Co. v. Burack*, 235 Mass. 398, 401, 126 N. E. 782, 784 (1920).

of the bank may be limited provided the limitation has the consent of the depositor.⁷ This result is based on the theory that freedom of contract must be upheld. On the other hand, it has been found by other courts that while the reciprocal rights and obligations inherent in the depositor-bank relation are sufficient to supply consideration for the bank's liability to stop payment, the release agreement is something new and requires additional consideration moving from the bank to the depositor. Absent such additional consideration the bank receives benefit but suffers no detriment.⁸ To the argument that the consideration for the depositor's release was the bank's not cancelling his account but allowing him to continue as a depositor with the bank, it has been answered that such consideration was not bargained for in exchange for the release agreement and therefore could not constitute a valid consideration.⁹ It has been suggested that promissory estoppel might supply the missing element of bargaining.¹⁰ The importance of consideration as a question for the court has, however, declined in recent years due to the rise of the public policy question.

As to the question of public policy, the courts favoring the validity of such clauses take the attitude that "inadvertence" includes negligence¹¹ and is intended to exonerate the bank from the negligence of its employees, and further hold that this exoneration is not against public policy.¹² The rationale is that, before it can be said that public policy has been contravened, it must be shown that the contract has a tendency to injure the public, is against public good, or is inconsistent with sound

⁷ *Gaita v. Windsor Bank*, 251 N. Y. 152, 167 N. E. 203 (1929). The court went further to say that a stop payment order, if it is not wished that the bank's liability be limited, should be positive and unqualified. A Bank not wishing to assume such liability may cancel the depositor's account and thus cancel the relationship. See *Chase National Bank of New York v. Battat et al.*, 297 N. Y. 185, 190, 78 N. E. 2d 465, 467 (1948).

⁸ *Speroff v. First Century Trust Co.*, 149 Ohio St. 415, 79 N. E. 2d 119 (1948). The court held (1) that an oral order to stop payment was sufficient and (2) that a subsequent written agreement containing the release clause was without consideration. There is an excellent annotation in 1 A. L. R. 2d 1155 (1948).

⁹ *Calamita v. Tradesman's National Bank*, 135 Conn. 326, 64 A. 2d 46 (1949); *Reinhardt v. Passaic-Clifton National Bank and Trust Co.*, 16 N. J. Super. 430, 84 A. 2d 741 (1951), *aff'd mem.*, 9 N. J. 607, 89 A. 2d 242 (1952); *RESTATEMENT, CONTRACTS* § 75(1) (1932). However, had there been a recital that the continuance of the relation was bargained for as consideration, the clause would have been enforceable as far as the consideration is concerned, and the courts might have been forced into the public policy field. Such was the situation in the principal case.

¹⁰ 25 N. Y. U. L. REV., 419, 421 (1950); *RESTATEMENT, CONTRACTS* § 90 (1932); 1 WILLISTON, *CONTRACTS* § 139 (rev. ed. 1936).

¹¹ *South Carolina*, in *Carroll v. South Carolina Nat. Bank*, 211 S. C. 406, 45 S. E. 2d 729 (1947) held that the burden of proof was on the bank to show inadvertence or oversight in payment. In *Martinez v. National City Bank of N. Y.*, 80 F. Supp. 545 (D. Puerto Rico 1948) (the only federal case concerning release agreements in stop payment orders) it was held that the bank is not liable for negligent payment under such an agreement as long as there is no wilful disregard of the order.

¹² *Tremont Trust Co. v. Burack*, 235 Mass. 398, 126 N. E. 782 (1920).

policy and good morals, either as to consideration or as to things to be done or not done. Further, goes the reasoning, it is actually to the best interest of the public that there be freedom of contract. Therefore such agreements should not be held void as against public policy unless they contravene what the legislature or judiciary has clearly established as public policy.¹³

In two states the public policy question is a cut and dried matter. California and Pennsylvania have declared by statute that such agreements are not enforceable.¹⁴ But where there is no statute, the courts have not been backward about making themselves the source of public policy based on well recognized common law principles. For example, in Ohio the supreme court held that a contract to relieve a bank of liability on account of inadvertence or oversight was against public policy and did not relieve the bank of its duty to act in good faith and exercise reasonable care.¹⁵ The New Jersey court did not have to decide the public policy question since it found a lack of consideration; however, the court suggested that banks be treated in the same way as quasi-public enterprises such as utilities, common carriers and the like, which are deprived of power to enforce release clauses of the type here involved.¹⁶ This was the theory on which the Pennsylvania Supreme Court declared the release in the principal case to be against public policy. Since the consideration question was answered by the Uniform Written Obligations Act¹⁷ and further by the release being under seal, the court likened banks to common carriers and public utilities, reasoning that all banks are subject to rigid state and federal controls and that every person must use such controlled banks if they are to use a bank at all. Since in Pennsylvania it is against public policy to allow a common carrier to limit its liability,¹⁸ the court held it also against public

¹³ *Hodnick v. Fidelity Trust Co.*, 96 Ind. App. 342, 183 N. E. 488 (1932).

¹⁴ California was the first to have such a statute, CALIF. CIV. CODE § 1668 (Deering, 1949): "Certain contracts unlawful. All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of the law, whether willful or negligent, are against the policy of the law." Such release agreements were held to be in violation of this statute in *Hiroshima v. Bank of Italy*, 78 Cal. App. 362, 248 P. 947 (1926); *Grisinger v. Golden State Bank*, 92 Cal. App. 433, 268 P. 425 (1928). The Pennsylvania Statute, a part of the Uniform Commercial Code, PA. STAT. ANN. tit. 12A § 4-103(1) (Purdon, 1954), was put into effect on 1 July 1954, too late to be applied by the court in the principal case. It reads as follows: "The effect of the provisions of this article may be varied by agreement, except that no agreement can disclaim a bank's responsibility to limit the measure of damages for its own lack of good faith or failure to exercise ordinary care."

¹⁵ *Speroff v. First Century Trust Co.*, 194 Ohio St. 415, 79 N. E. 2d 119 (1948).

¹⁶ *Reinhardt v. Passaic-Clifton National Bank and Trust Co.*, 16 N. J. Super. 430, 84 A. 2d 741 (1951), *aff'd mem.*, 9 N. J. 607, 89 A. 2d 242 (1952).

¹⁷ PA. STAT. ANN. tit. 33 § 6 (Purdon, 1949) (the words "The undersigned agrees to be legally bound hereby." eliminate the necessity for consideration.).

¹⁸ *Turek v. Pennsylvania Railroad Co.*, 361 Pa. 512, 64 A. 2d 779 (1949); *Coleman v. Pennsylvania Railroad Co.*, 242 Pa. 304, 89 Atl. 87 (1913).

policy to allow a bank to do so. While these two areas are not completely analogous, since banks are not required to accept all persons who apply for their services as are utilities and common carriers, still there is enough similarity to enable the Pennsylvania court to reach its desired result.

Another point to consider is that although, theoretically, the bank and depositor have equal bargaining power, in actuality they do not. The depositor, not being so well versed in his rights as the bank, is usually made to feel that the bank is doing him a favor and thinks that he is obligated to sign whatever release he is given.¹⁹ Also the bank has the deeper pocket, is better protected by insurance, and is therefore better able to absorb the loss.²⁰ Then too, the loss may be distributed through service charges on stop payment notices.²¹ These are not legal considerations, but they are some of the things which go into making up public policy.

No North Carolina decision has yet passed on the validity of release clauses or agreements in stop payment orders. However, in *Miller's Mutual Fire Insurance Ass'n v. Parker*²² the court has held that a parking lot owner, "a professional bailee," could not, by giving notice orally, on signs or printed on the claim check, relieve himself of liability for loss by fire or theft of the cars placed under his care. And from the common carrier angle, the court recently held in *Crowell v. Eastern Air Lines*²³ that an airline could not limit its liability for accidents by an agreement on the ticket requiring, as a prerequisite to action predicated thereon, that all accident claims be filed within ninety days, since such a limitation is void as against public policy. In view of these two cases it does not seem that the North Carolina Supreme Court would look with much favor on a release agreement in a stop payment order.

Only time and litigation can tell what the courts will do in the future with respect to such release agreements. However, with the adoption of the Uniform Commercial Code²⁴ by more and more states, it would seem that release agreements are doomed to be held against public policy even more frequently in the future than they have been in the past.

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¹⁹ See Note, 29 COL. L. REV. 1150 (1929).

²⁰ See Comment, 25 TEMP. L. Q. 486 (1952).

²¹ See Note, 27 N. Y. U. L. REV. 345, 348 (1952).

²² 234 N. C. 20, 65 S. E. 2d 341 (1951).

²³ 240 N. C. 20, 81 S. E. 2d 178 (1954).

²⁴ *Supra* note 14.